No. 21,986

In the

United States Court of Appeals

For the Ninth Circuit

ELSIE HAMMAN,

vs. *Appellant,*

U. S. A. and WASHINGTON IRON WORKS, et al.,

Appellees,

ARLENE HARTUNG REED, etc.

vs. *Appellant,*

U. S. A. and WASHINGTON IRON WORKS, et al.,

Appellees,

ANNA LOYNING, etc.

vs. *Appellant,*

U. S. A. and WASHINGTON IRON WORKS, et al.,

Appellees.

Brief of Appellees

ROBERT E. BURNS
CRIMMINS, KENT, BRADLEY & BURNS
155 Montgomery Street
San Francisco, California 94104
Telephone: 982-5250

WEYMOUTH D. SYMMES
ANDERSON, SYMMES, FORBES, PEETE & BROWN
Suite 300, First National Bank Building
Billings, Montana 59101
Telephone: 252-8446

Attorneys for Appellees

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Brief of Appellees

Appellants' brief does not present an accurate picture of the nature of the claims on appeal, the matters before the District Court, and the issues involved in this appeal. Ap-

pellees are therefore compelled to set forth a statement in order that the consolidated cases may be viewed in proper perspective.[1]

STATEMENT OF THE CASE

1. Preliminary Statement.

This is an appeal from partial summary judgments (R. 69, 71, 73)[2] on Count III of three civil complaints filed by appellants as the personal representatives of the estates of their deceased husbands claiming treble damages under sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act (15 U. S. Code, secs. 1, 2, and 15; R. 3, 17, 31).[3]

Counts I and II of the complaints are survival actions for personal injuries to the decedents and for their wrongful deaths as the result of an accident occurring on or about March 6, 1963, while decedents were employed by appellees as construction workers during the construction for the United States of the Yellowtail Dam in the County of Big Horn, Montana (R. 4, 18, 32).

Count III of each complaint purports to allege a claim under sections 1 and 2 of the Sherman Act arising out of the same accident on March 6, 1963, which resulted in the deaths of the decedents (R. 3, 17, 31).

The District Court for the District of Montana, Honorable W. J. Jameson, Judge, granted partial judgments dismissing Count III of each complaint (R. 69, 71, 73) after

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1. Appellees (defendants in the court below) are Morrison-Knudsen Company, Inc., Perini Corporation, Walsh Construction Company, Inc., and Kaiser Company. Appellees together with F. & S. Contracting Company (not a party) formed a joint venture known as Yellowtail Constructors to build the Yellowtail Dam.

2. References to pages of the record are identified as "R." References to Appellants' Brief will be designated "App. Br."

3. The actions were consolidated for trial (R. 49). Each complaint including Count III is the same in essential allegations.

filing a memorandum opinion which thoroughly analyzed and considered appellants' allegations and contentions (R. 62-66).[4] The District Court reserved for further consideration questions under Counts I and II of the complaints relating to the immunity of appellees as employers from civil liability under the Workmen's Compensation Act of Montana (R. 49-61).

2. The Record.

Each complaint alleges that on or about March 6, 1963, the decedent (respectively, Orville Hamman, Adam Hartung, and Sidney A. Loyning), while in the course of his employment and while a passenger on a platform suspended by cables, was caused to be thrown from the platform and killed when two cables negligently designed, installed, inspected, and maintained snapped and broke (R. 4, 18, 32). The complaints further allege that defendant United States of America was possessor of the construction site and had contracted with appellees for construction of the Yellowtail Dam (R. 4, 18, 32). Defendant United States as owner of the land and the improvements is charged with negligence in failing to provide a safe place to work, in failing to employ competent contractors, in allowing the installation and maintenance of the cableway in an unsafe and hazardous manner, and in employing incompetent inspectors (R. 5, 20, 33). Defendant Washington Iron Works is alleged to have violated its duties to the plaintiffs in negligently designing, manufacturing, and installing the cableway (R. 5, 19, 32, 33). Appellees are charged with negligently installing and using the cableway without safety devices and with negligently failing to provide safe procedures, safe equip-

4. Judge Jameson's opinion is reported in 267 F. Supp 420, 429-432.

ment, and safe installation and operation of the cableway (R. 9-11, 23-25, 37-39).

Appellants further allege in paragraphs 23 and 24 of their respective complaints with respect to all defendants (R. 11, 25, 39):

> "23. That the aforesaid acts of negligence of each of the defendants was a proximate cause of plaintiff's decedent's death and plaintiff's injuries.
>
> 24. That plaintiff's decedent suffered conscious pain between the time of his initial injury and his death shortly thereafter."

In paragraph 25 of Count 1 of each complaint (R. 11, 25, 39) it is alleged that damages are sought under the Montana survival act for decedents' conscious pain and suffering and in addition all other damages which are fair and just for wrongful death as provided by the Montana Wrongful Death Act. Exemplary damages are also claimed (R. 12, 26, 40).

Count III of each complaint, on which judgment was granted to appellees in the court below, alleges that the contractor defendants, (appellees) were competitors in the heavy construction field in interstate commerce; that there were eight bids submitted to the United States for the contract to construct the Yellowtail Dam; that the contractor defendants were the low bidder at a bid price of $39,809,359; and that illegal price fixing allowed them to secure the contract with the U. S. government at this bid price with the next bidder but $26,807 higher (R. 13, 27, 41). Count III further alleges that but for the illegal price fixing the defendant contractors would not have secured the bid and could not have injured plaintiffs' (appellants') property (R. 14, 28, 42, para. 22); and that pursuant to the illegal conspiracy to fix the bid price defendant contractors fraudulently promised the United States to use safe equipment

but that they intended to use the cableway without safety devices; that this aspect of the illegal price fixing conspiracy was the proximate cause of injury to the marital partnership and consortium, in that the death of decedents would not have occurred but for the absence of safety devices required on the cableways (R. 14-15, 28-29, 42-43).

The District Court had before it the affidavits of Carroll F. Zapp, vice president and general counsel of appellee Morrison-Knudsen Company, Inc. (R. 87-98). The verified statements in Mr. Zapp's affidavit were not controverted by appellants and thus are to be accepted as true. The affidavits may be summarized as follows:

Appellees were joint venturers constructing the Yellowtail Dam. Before construction started on the Yellowtail Dam, the Bureau of Reclamation of the United States called for bids for the construction of the dam. In answer to this call appellees Morrison-Knudsen Company, Inc., Perini Corporation, Walsh Construction Company, Inc., Kaiser Company, and F. & S. Contracting Company as a joint venture submitted a bid to the Bureau of Reclamation (R. 88). On May 1, 1961, appellees executed a joint venture agreement for performing the contract with the United States (R. 90-A to 93). The joint venture was designated the Yellowtail Constructors (R. 91), and a certificate of assumed business name was recorded in the County of Bighorn (R. 88). The joint venture maintained workmen's compensation insurance and compensation is being paid pursuant to the compensation law to the dependents of the decedents (R. 89). The pay roll and all books and records of the joint venture are maintained separate and apart from the records of the members of the joint venture (R. 89).

The bid of the Yellowtail Constructors Joint Venture was one of seven bids submitted (R. 95). Its bid of $39,-

$09,359 was the low bid. Another joint venture, Arundel Dixon group, was high bidder with a bid of $50,201,239 (R. 95). The engineers' estimate for the work was $47,-$30,638 (R. 95). Of the seven bidders, five were joint ventures (R. 95).

The use of joint ventures is well established and common in the heavy construction industry, particularly on multimillion dollar projects (R. 95). Commencing with the Hoover Dam in the early 1930s, large Federal Government projects have almost always been constructed by joint ventures of contracting companies (R. 95). Prior to the Hoover Dam in 1930 no American heavy construction company had the financial support, manpower, or equipment resources to undertake a project in the multimillion dollar class and no single bonding company had the financial capacity to write the necessary performance and payment bonds (R. 95).

Joint ventures promote competition in the construction industry (R. 95). Very few construction companies have the financial resources to undertake a construction project in excess of $10,000,000 and even fewer have resources to undertake a project in excess of $25,000,000 (R. 95-96). Through the means of a joint venture a group of smaller companies can pool their financial resources and a group of bonding companies can group their bonding capacities for the submission of a bid on a large project and for performance of the work if the bid is successful (R. 96). Federal and state governmental agencies have recognized that joint bidding as a joint venture increases the number of bidders and lower bids because smaller companies may join to submit bids (R. 96). The Bureau of Reclamation's engineers' estimate of cost was $47,830,638, more than $8,000,000 above the low bid of the Yellowtail Constructors. Only two of the seven bidders were higher than the engineers' estimate (R. 96).

The annual value of construction work in the United States now exceeds thirty billion dollars and no single contracting company has contract volume of more than one-half of one percent of this work (R. 96). Even the largest contracting firms can effectively estimate no more than 50 projects a year of the many thousands offered and if it were not for the joint venture form defendants as well as others in the industry would be limited to bidding on a select group of projects (R. 96). At times the Federal Government requests a number of construction firms to form a joint venture for the purpose of performing work under a negotiated contract on an urgency basis (R. 97).

Joint ventures are not continuing entities and are formed to bid on and perform, if successful, a definite project and are dissolved upon completion of the project (R. 97). Joint venture partners on one project bid actively and aggressively against their partners in that project on other projects. To the knowledge of deponent Zapp no question of restraint of trade or of collusive or of monopolistic practices has ever been raised by governmental authorities with respect to joint ventures in the construction industry and no such claim has ever been raised by the Department of Justice in claims proceedings or litigation between the Federal government and joint venture contractors or in any other connection (R. 97, 98).

QUESTIONS PRESENTED

Appellees do not agree that the questions presented by appellants are the questions on this appeal (App. Br. p. 2).

Question I does not present an issue in a private antitrust action, and neither an affirmative nor negative answer is relevant. Question II was properly answered by the District Court in the negative.

The questions involved in this appeal, as appellees see them, are:

1. Was the joint venture agreement of appellees to bid on the Yellowtail Dam Project a price fixing conspiracy prohibited by section 1 of the Sherman Antitrust Act (15 U. S. Code, sec. 1)?

2. Were appellants or their decedents directly and proximately injured in their business or property by reason of anything forbidden by section 1 of the Sherman Act?

Appellees submit that both questions should be answered in the negative.

SUMMARY OF ARGUMENT

Appellants have not alleged a cause of action under the antitrust laws.

Appellees' joint venture agreement to bid and the submitting of a joint bid to construct the Yellowtail Dam were not a price-fixing agreement or an illegal agreement prohibited by sections 1 or 2 of the Sherman Act.

Appellants do not allege injury to business or property by reason of anything forbidden by the antitrust laws. Appellants were not and could not be damaged by the alleged price-fixing agreement. The alleged fraudulent promises to the United States to perform severally and to use safe equipment are not offenses prohibited by the Sherman Act.

Even assuming an illegal agreement, appellants were not within the area of any alleged restraint and there was no injury proximately caused to the business or property of appellants by any act of appellees prohibited by the antitrust laws. Appellants are actually claiming damages for personal injuries and wrongful death and not for injury to business or property within the meaning of section 4 of the Clayton Act (15 U. S. Code, sec. 15).

There is no genuine issue as to any material fact, and the District Court appropriately granted the partial summary judgments on Count III of the complaints.

ARGUMENT

I. The Joint Venture Agreement to Bid on the Yellowtail Dam Was Not a Price Fixing Agreement.

Appellees formed a joint venture to submit a bid on the Yellowtail Dam Project and to enter a contract with the United States and construct the dam if the bid was low and accepted (R. 88).

Consideration of the reasons for the widespread use for many years of joint ventures in the construction industry and for their appproval by the Federal and state governments is apposite. A joint venture is formed to bid one job and perform the work if the bid is successful (R. 97). A joint venture allows contractors to bid on projects which they would not have the financial resources to bid alone. The capital requirements of a $40,000,000 project, as here, are beyond the means of most contractors. A joint venture enables contractors to bid on many more jobs. There is a division of risk in the high risk business of heavy construction. There is the contribution of the specialized experience and skills of the joint venturers in the complicated and diverse operations of constructing dams, tunnels, and hydroelectric installations, all of which may be included in one project. The effect of joint ventures is to increase the number of bidders on large projects since the participants could not bid the projects alone. The joint venture is an economic necessity in this day of huge, multimillion dollar projects. The seven bids on the Yellowtail Dam attest to the competitive bidding for the job (R. 94-97).

Appellants claim that the formation of the joint venture to bid on the Yellowtail Dam Project was *per se* unlawful.

The authorities are to the contrary. Joint ventures, particularly those formed for a limited purpose, are not *per se* unlawful. The Supreme Court in *United States v. Penn Olin Chemical Co.*, 378 U.S. 158, 12 L. Ed. 2d 775 (1964) considered the jointly owned corporation of Pennsalt Corporation and Olin Mathieson Corporation, formed for the production and marketing of sodium chlorate, to be a joint venture (378 U.S. at 165, 169). The court held that on the record there was no violation of section 1 of the Sherman Act as charged by the government (217 F. Supp. 110, 113). The fact that the agreement provided for the production and sale of a product at a price by two large competing companies acting as a joint venture did not call for the application of the *per se* principle although the government had charged a section 1 violation.

Syndicates which underwrite the issuance and sale of securities are joint ventures. In *United States v. Morgan*, 118 F. Supp. 621, Circuit Judge Harold R. Medina, presiding in the District Court, Southern District of New York, held that there was nothing in the cases which bound him to find the syndicate agreements to be illegal *per se* (118 F. Supp. at 689). The government claimed that the purchase by a syndicate of underwriters of a security issue from an issuer and its distribution to the public through dealers was the same as the purchase and resale of commodities with price restrictions down the line. The court held to the contrary stating that an underwriting syndicate is an *ad hoc* common enterprise, limited in number of participants, in purpose, and in duration, and that it is a reasonable business combination having the purpose and effect of efficiently promoting, rather than restraining, trade (118 F. Supp. at 690). The reasoning and decision by Judge Medina are applicable here. Joint ventures in the construction industries are *ad hoc* enterprises, limited in number of partici-

pants, in purpose, and in duration. Joint ventures have the effect of efficiently promoting, rather than restraining, trade.

The position of the Federal Government and the courts regarding the propriety of submitting a single bid on contracts by joint venturers is revealed by a series of consent decrees allowing joint venture bids where in absence of a joint venture the parties could not submit single bids or perform the contract.[5] If the entry into a joint venture for the purpose of submitting a single bid were price fixing and *per se* illegal, the qualification to the permission granted in the consent decrees would be irrelevant. The joint venture form of doing business almost invariably involves the joint production or sale of a commodity or service at price. The formation and conduct of such joint ventures are not illegal *per se* under the antitrust laws. On the contrary, joint ventures are recognized as a common form of business enterprise and are reasonable business combinations having the purpose and effect of promoting, rather than restraining, trade.

Appellants' purpose in charging a price fixing conspiracy appears on the face of the complaint. The alleged conspiracy is intended as a jurisdictional vehicle which is to carry their real claims for personal injuries and wrongful death and is intended to avoid the immunity of appellees as employers under the Montana Workmen's Compensation Act. The actual claims are alleged in the complaints to have arisen from a variety of causes including the negli-

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5. There are many such cases and the following are representative: *U.S. v. National Electrical Contractors Assn.* (D. N.J.) 1956 Trade Cases, Para. 68,534; *U.S. v. New England Concrete Pipe Corp.* (D. Mass.) 1959 Trade Cases, Para. 69,481; *U.S. v. General Electric Co.* (E.D. Pa.) 1962 Trade Cases, Para. 70,367; *U.S. v. Allen-Bradley Co.* (E.D. Pa.), 1962 Trade Cases, Para. 70,420; *U.S. v. Westinghouse Electric Corp.* (E.D. Pa.), 1962 Trade Cases, Para. 70,487; *U.S. v. General Electric Co., et al.* (E.D. Pa.), 1962 Trade Cases, Para. 70,488.

gence of appellees and the negligence of the United States and Washington Iron Works. In Count III, the proximate cause of the injuries is not alleged to be the price fixing conspiracy (and it could not be such a cause), but rather the failure to perform the promise to use safe equipment (R. 14-15, 28-29, 42-43, Par. 27, 28) and the promise of several performance (R. 14, 28, 42, Par. 23; App. Br. 5).

II. There Is No Allegation of Injury to Business or Property by Reason of Anything Forbidden by the Antitrust Laws.

Appellants seem to assume that allegation of a conspiracy automatically establishes injury.[6] This is diametrically opposed to the cardinal principle under the antitrust laws that a conspiracy in and of itself does not give rise to a private cause of action but that such right of action is based on injury to business and property by reason of a conspiracy forbidden by the antitrust laws. *Burnham Chemical Co. v. Borax Consolidated,* 170 F.2d 569, 571 (9 Cir. 1948), cert. denied 336 U.S. 949; *Suckow Borax Mines v. Borax Consolidated,* 185 F.2d 196, 208 (9 Cir. 1950).

1. THE ALLEGED ACTS ARE NOT FORBIDDEN BY THE ANTITRUST LAWS.

The Sherman Act, as the District Court has said (R. 66), "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce". *Hunt v. Crumboch,* 325 U.S. 821, 826, 89 L.Ed. 1954 (1945). Even if a price fixing conspiracy is assumed, appellants could not have been injured by it. It is axiomatic that a private litigant can only be injured by a price fixing conspiracy

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6. This is epitomized by their complaint and summary of argument alleging illegal price fixing, fraudulent promises to the United States, and alleged negligent installation, management, and inspection of a cableway by appellees, the United States, and the Washington Iron Works.

when the fixed price is higher than the "competitive" price would have been in absence of the conspiracy. *Wolfe v. National Lead Company,* 225 F.2d 427, 433 (9 Cir. 1955), cert. den. 350 U.S. 915 (1955); *American Sea Green Slate Co. v. O'Halloran,* 229 Fed. 77, 80 (2 Cir. 1915). But whether the bid was high or low, appellants and their decedents as construction employees could not be proximately injured by an alleged price fixing conspiracy in submitting a bid to the United States on a construction project. They were not purchasers of any product and had no property interest in the construction project.

Appellants attempt to bridge the gap by alleging breach of promises and commission of other torts: (1) a fraudulent promise to perform the contract severally when appellees intended to perform jointly; and (2) a fraudulent promise to the United States to use safe equipment when appellees intended to use unsafe equipment. To say that fraudulent promises are part of a price fixing conspiracy does not constitute them restraints under section 1 of the Sherman Act. In *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6 Cir. 1963), the court said at page 286:

> "In considering the issue in this case, it must be kept in mind that plaintiff is not seeking a recovery for an alleged breach of contract or damages based on any common law action for tortious interference with contract rights or for unfair competition or for any common law tort. Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the antitrust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311; Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 464; Hunt v. Crumboch, 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954."

The alleged fraudulent promises to the United States and the use of unsafe equipment are not acts forbidden by the antitrust laws.

In *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 84 L.Ed. 1311, the court at page 483 said:

> "It is not denied, and we assume for present purposes, that respondents by substituting the primitive method of trial by combat, for the ordinary processes of justice and more civilized means of deciding an industrial dispute, violated the civil and penal laws of Pennsylvania which authorize the recovery of full compensation and impose criminal penalties for the wrongs done. But in this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal rights as Congress has conferred on petitioner by the Sherman Act and violence as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction."

And at page 512:

> "Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price or discriminate between its would-be purchasers.' "

The incorporation of a company to compete with plaintiff, the spreading of false reports concerning him and malicious prosecution are tortious acts but they are not forbidden by the antitrust laws. *Forgett v. Scharff,* 86 F. Supp. 128 (D. N.J. 1949). A conspiracy to injure plaintiff in his business of publishing, writing, distributing books, and selling food products by libeling, slandering him and by other unlawful acts to destroy his business are torts actionable under state laws but not under the antitrust laws. *Hohensee v. Akron Beacon Journal Publishing Co.,* 171 F. Supp. 90 (D. Ohio 1959); aff'd 277 F.2d 359 (6 Cir. 1960); cert. den. 363 U.S. 913. Tortious interference with sales of plaintiff's products and price cutting are not violations of the Sherman Act. *Sunbeam Corp. v. Payless Drug Stores,* 113 F. Supp. 31, 42 (N.D. Cal. 1953).

The alleged tortious acts of appellees in falsely promising the United States to perform severally and of installing and maintaining unsafe and defective equipment are not violations of the antitrust laws. These are the acts which appellants allege caused them damage, but they are not acts forbidden by anything in the antitrust laws.

Tepler v. Frick, 112 F. Supp. 245 (S.D. N.Y. 1952), aff'd 204 F.2d 506 (2 Cir. 1953), cited by the District Court (R. 66), was an action by a baseball pitcher against the Commissioner of Baseball for treble damages for personal injuries. The District Court held that the complaint did not show damages to plaintiff resulting proximately from acts constituting violation of the antitrust laws by the defendants. The Court of Appeals for the Second Circuit affirmed. Appellants here have alleged acts by appellees, but the acts are not those forbidden by the antitrust laws.

2. APPELLANTS WERE NOT WITHIN THE AREA OF ANY ALLEGED RESTRAINT.

If there was, as appellants claim, a price fixing conspiracy, appellants and their decedents could not have been injured thereby.

Appellants were clearly outside the "target area" as that term has been used by this court and other Federal courts as a factor in determining whether there was proximate causation. The cases of this court cited by the District Court in its Opinion (R. 65, 66) and by appellants[7] demonstrate clearly that no act of the alleged price fixing damaged appellants or their decedents and that the decedents were not "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry". *Conference of Studio Unions v. Loew's, Inc.* (9 Cir. 1951), 193 F.2d 51, 54-55. The alleged price fixing did not damage the United States because appellees were low bidders of seven. If there was damage, the damage would have been to the United States as owner of the project. Appellants and their decedents as employees were not in the area "which it could be reasonably foreseen would be affected by the conspiracy". *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F. 2d 190, 220 (9 Cir. 1964). Appellants attempt to surmount this hurdle by alleging that appellees conspired to use unsafe equipment and to perform severally instead of jointly. But these alleged conspiratorial acts are not, as we have seen, forbidden by the antitrust laws. These acts may be torts cognizable under state law. The District Court found that the alleged injuries were collateral and not compensable under the Antitrust Act (R. 65). The authorities uniformly support the conclusion of the District Court.

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7. App. Br. pp. 9-10. *Conference of Studio Unions v. Loew's Inc., infra; Twentieth Century Fox Film Corporation v. Goldwyn, infra;* and *Karseal Corporation v. Richfield Oil Corporation* (9 Cir., 1955), 221 F.2d 358

The quotation from *Conference of Studio Unions v. Loew's, Inc., supra,* cited in appellants' brief (App. Br. p. 9) is apposite. In addition to allegations of a conspiracy in restraint of trade a plaintiff must show an act has been committed which harms him and that he is within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. If he fails to do so, he is not injured "by reason of anything forbidden in the antitrust laws". Appellants have failed to make any such allegations. The purpose of the alleged conspiracy was price fixing in submitting the bid. Such an act could not conceivably have caused the accident which resulted in the deaths of appellants' decedents on the allegedly defective cableway. If the alleged price fixing conspiracy is assumed to have caused a breakdown in the competitive conditions in the construction industry, appellants' decedents as construction workers were not thereby affected so far as their personal safety was concerned. It could not be reasonably foreseen or foreseen at all that the price fixing with which appellees are charged could be in any way connected with an accident on the job during construction.

Even in those cases where plaintiffs' loss resulted from an impairment of a business relationship with another entity which was the object of the conspiracy, recovery has been uniformly denied. The losses have been designated as "secondary" or "derivative" and not those arising by reason of a violation of the antitrust laws. Officers and employees of an injured corporation *(Bookout v. Schine Chain Theatres, Inc.,* 253 F. 2d 292, 2 Cir. 1958; *Martens v. Barrett,* 245 F.2d 844, 846, 5 Cir. 1957); a stockholder of an injured corporation *(Goldsmith v. St. Louis Railway,* 201 F. Supp. 867, D. N.C. 1962; *Petersen v. Borden Co.,* 50 F.2d 644, 7 Cir. 1931); a partner in an injured business

partnership (*Coast v. Hunt Oil Co.*, 195 F. 2d 870, 872, 5 Cir. 1952, cert. denied 344 U. S. 836 (1952)); a landlord of an injured lessee (*Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389, aff'd. 113 F. 2d 114, 2 Cir. 1940); a supplier of an injured customer (*Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, D. Mass. 1956); and the owner of a patent licensed to an injured licensee (*Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678, 2 Cir. 1955, cert. denied 350 U.S. 936 (1956)); were all denied recovery. Each one of these plaintiffs had business relationships with the objects of the conspiracy. These plaintiffs could be said to have had some relationship to the "target area." Appellants and their decedents had none.

The "target area" concept is a factor in determining whether there was proximate causation. *Twentieth Century Fox Film Corp. v. Goldwyn, supra,* at p. 220. In no sense can appellants claim that they, their decedent husbands, or their alleged rights to consortium were aimed at or hit by the alleged price fixing conspiracy or that they were in the area of the economy which it could be reasonably foreseen would be affected by any such conspiracy.

A plaintiff in an antitrust action must also allege a causal connection between the violation of the antitrust laws which is alleged and the injury to his business or property. There must be an impact of the antitrust violation on the business or property of the plaintiff.

Keogh v. Chicago and N.W. Ry. Co., 260 U.S. 156, 165, 67 L.Ed. 183 (1922)

Wolfe v. National Lead Company, 225 F.2d 427, 433 (9 Cir. 1955)), cert. den. 350 U.S. 915 (1955)

Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 909 (2 Cir. 1962), cert. den. 369 U.S. 865 (1962)

Northwestern Oil Co. v. Socony Vacuum Oil Co., 138 F.2d 967, 971 (7 Cir. 1943), cert. den. 321 U.S. 792 (1944)

Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731, 737 (9 Cir. 1959)

In *Talon, Inc. v. Union Slide Fastener, Inc., supra,* this court, at page 736-737, said:

"In addition to establishing that Talon has violated the anti-trust laws, Union before being entitled to award of damages must establish that Talon's violations of the antitrust laws were a proximate cause of injury to it, and must also prove the extent of that injury. As stated by this Court in Flintkote Company v. Lysfjord, 9 Cir., 1957, 246 F. 2d 368, at page 392, certiorari denied 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed. 46: 'We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection beween defendant's wrongful act and some loss of anticipated revenue.' If Union had established with reasonable probability the causal connection between the unlawful acts of Talon and the resultant injury to Union in its property or business, the district court, in the absence of evidence which would have established the amount or extent of damage with reasonable probability, could have made a just and reasonable estimate of damage based on relevant data and could have rendered its verdict accordingly. Bigelow v. R.K.O. Radio Pictures, Inc., 1945, 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652. The distinction then is "between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage." *Flintkote Company v. Lysfjord,* supra. (Emphasis by the court)

As stated by the Supreme Court in Story Parchment Co. v. Paterson Parchment Paper Co., 1930, 282 U.S. 555, at page 562, 51 S.Ct. 248, at page 250, 75 L.Ed.

544: '* * * there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. * * *' See also *Eastman Kodak Co. v. Southern Photo Material Co.,* 1926, 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684."

Appellants have failed to meet these requirements. They do not allege facts from which it may be inferred how or in what manner the alleged price fixing conspiracy damaged their business or property or the causal connection between the alleged price fixing and the personal injuries and deaths of appellants' decedents. In fact, it appears that appellants do not actually claim in their complaints that the alleged price fixing conspiracy injured their business or property or that there was a causal connection between the alleged violation and the injury. Instead, appellants rely on collateral matters which might constitute either a breach of the contract between appellees and the United States or fraudulent promises to the United States to perform severally and to use safe equipment. None of these is an act in restraint of trade prohibited by section 1 of the Sherman Act.

In short, as appellants themselves appear to say (App. Br. p. 14), Count III is based on damages arising from the alleged negligence of appellees, not on a restraint of trade under the Sherman Act or injury directly caused to business or property by reason of anything forbidden by section 1 of the Act.

3. THE BUSINESS OR PROPERTY OF APPELLANTS WAS NOT INJURED.

Appellants recognize that the right to consortium is not a "business" but they claim such a right is "property". The District Court concluded that if the right to consortium is a "property right" in Montana, the right is not one that the antitrust laws were intended to protect (R. 67, 267 F. Supp., at page 432).[8] A right to consortium is not property which could be the object of a conspiracy or which could be injured by a conspiracy to restrain trade, monopolize, control markets or discriminate among purchasers *(Apex Hosiery Co. v. Leader, supra,* 310 U. S. at page 512). The court in *Waldron v. British Petroleum Co.,* 231 F. Supp. 72 (S.D. N.Y. 1964) held that a contract right was property and that it was the type of a contract right which was within the area directly and primarily affected by the conspiratorial acts. The contract right there was of the type which was capable of being injured by the prohibited restraints on trade with which defendants were charged. In order to come within the scope of section 4, the business or property must be of the kind to be found in the area which it could be reasonably foreseen would be affected by the conspiracy. *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190, 220 (9 Cir. 1964). To be in the affected area the property must be the kind of property which can be proximately injured by acts forbidden by the antitrust laws. A fixed price cannot directly or proximately cause injuries to a person or death.

Appellants say that the right to consortium is the right of the wife to the support, aid, protection, affection, and society of her husband (App. Br. 13). Appellants also claim damages for alleged injury to these rights under the

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8. Section 4 of the Clayton Act (15 U.S. Code, Sec. 15) refers to "any person who shall be injured in his business or property . . .".

Montana Survival Act and Montana Wrongful Death Act in Count I of their complaints (R. 11, 25, 39, par. 25). Under the Wrongful Death Act, loss of support, aid, protection, affection and society of a deceased spouse are the elements of damage (section 93-2810 R.C.M., 1947; *Mize v. Rocky Mountain Bell Tel. Co.,* 38 Mont. 521, 100 P. 971, 974 (1907)); in other words, the compensable elements are the same.

It thus appears that appellants are not really claiming damage to property. They employ the phrase, but each appellant as survivor actually claims damages for wrongful death and for personal injuries to a deceased husband. Count III is only a restatement of the basic claims for personal injuries to decedents negligently caused and resulting in death.

We have shown that many business and property rights (*supra,* pp. 13-15, 17, 18) are not within the area threatened by an alleged conspiracy in violation of the antitrust laws. Claims for personal injuries and for wrongful death cannot be in any threatened area. They are not trade nor are they in trade. They are not property or the kind of property intended to be protected against restraints of trade in violation of the antitrust laws.

In support of their assertion that industrial safety is one of the social benefits of a competitive economy (App. Br. 6), appellants include in the Appendix to their brief excerpts from trade publications dealing with safety and workmen's compensation insurance (App. Br. Appendix 1a-14a). None of these materials has any bearing on restraints of trade prohibited by section 1 of the Sherman Act. The materials do, however, confirm that appellants in Count III of their complaints are only restating in another form claims against their employer based on negligence for personal injuries and wrongful death as set forth in Count I.

Whether these claims for personal injuries and wrongful death are barred by the Montana Workmen's Compensation Act (R.C.M. 1947, secs. 92-201, 92-204) is still before the District Court. Although the District Court was of the view that no genuine issue of fact was presented with respect to the claims alleged in Counts I and II, the court gave appellants a further opportunity to apprise the court of evidence they may have to avoid the limitation of liability of appellees under the Montana Workmen's Compensation Act (R. 58, 59).

III. Summary Judgment Was Properly Granted.

There is no genuine issue as to any material fact. If the allegations of Count III are assumed to be true, appellants have not stated a claim under the antitrust laws because they have not alleged injury to business or property directly and proximately caused by acts forbidden by the antitrust laws.

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 165; 67 L.Ed. 183 (1922) and cases cited, *supra.*

Moreover, appellants rest on the allegations of their pleadings and this they may not do in the face of the averments in the affidavits of Carroll F. Zapp (R. 87-98). Appellants have not set forth specific facts showing that there is a genuine issue for trial as required by Rule 56(e), *Federal Rules of Civil Procedure.*

Lindsey v. Leavy, 149 F.2d 899, 902 (9 Cir. 1945)

In stating that "Issues of negligence are not ordinarily susceptible of summary judgment" (App. Br. 14), appellants again confirm that the real gist of their claims is negligence and not injury to business or property directly

and proximately caused by acts forbidden by section 1 of the Sherman Act.

The District Court appropriately granted partial judgments dismissing Count III of each of the complaints with prejudice and on the merits (R. 69, 71, 73).

IV. Conclusion.

For the reasons set forth above, the judgments of the District Court should be affirmed.

Dated: December 5, 1967.

Respectfully submitted,

Robert E. Burns
Crimmins, Kent, Bradley & Burns

Weymouth D. Symmes
Anderson, Symmes, Forbes, Peete & Brown

Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert E. Burns

Attorney for Appellees